

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother,
HEATHER JACKSON,
Plaintiff,**

v.

**Civil Action No. 2:21-cv-00316
Honorable Joseph R. Goodwin, Judge**

**WEST VIRGINIA STATE BOARD OF EDUCATION,
HARRISON COUNTY BOARD OF EDUCATION,
WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, W. CLAYTON BURCH
in his official capacity as State Superintendent, and
DORA STUTLER in her official capacity as
Harrison County Superintendent,
Defendants,**

And

**LAINEY ARMISTEAD,
Defendant-Intervenor.**

WVSSAC’S MOTION FOR LEAVE TO FILE SURREPLY

Now comes West Virginia Secondary School Activities Commission (WVSSAC), by counsel, Roberta F. Green, Kimberly M. Bandy, Shannon M. Rogers and Shuman McCuskey Slicer PLLC, and, pursuant to Local Rule 7.1(a)(7), moves for leave to file the Surreply attached as Exhibit A in order to formally present Plaintiff’s admission against interest, on information and belief, made expressly for the first time in Plaintiff’s Reply In Support Of Her Motion *In Limine* To Exclude Evidence and/or Testimony of Bernard Dolan Regarding Certain Hearsay Statements and Supporting Memorandum Of Law.¹ Whereas WVSSAC has identified a number of related admissions and/or admissions by omission by the Plaintiff, the capstone admission that “**Mr.**

¹ ECF No. 470 at 2.

Dolan is not a legislator and did not have any input on whether or if H.B. 3293 was enacted”²

appeared for the first time after the close of motions practice for WVSSAC. These arguments and claims have never appeared previously in Plaintiff’s briefs nor ever in Plaintiff’s briefs with WVSSAC, and thus WVSSAC has not had an opportunity to reply or to place this admission in context with WVSSAC’s pending motions and arguments. The attached Surreply addresses only this admission and does not stray into ancillary or new issues or evidence beyond that scope. *See Cordish Cos. v. Affiliated FM Ins. Co.*, 573 F. Supp. 3d 977 (D. Md. 2021) at 988, stating that “[a] surreply is ordinarily permitted when the party seeking to file the surreply ‘would be unable to contest matters presented to the court for the first time’ in the opposing party’s reply. *Clear Channel Outdoor, Inc. v. Mayor & City Council of Baltimore*, 22 F. Supp. 3d 519, 529 (D. Md. 2014) (quotations and citations omitted). Conversely, a surreply is usually not permitted if the content is merely responsive to an issue raised in the opposition. *See Khoury v. Meserve*, 268 F. Supp. 2d 600, 605-06 (D. Md. 2003).”

Where courts have declined to allow for a surreply when one party merely raises a new argument that only gained saliency through the other party’s reply,³ the instant ‘argument’ against interest was never revealed by the Plaintiff in motions practice with WVSSAC or in discovery. Most interestingly, the admission was made in motions practice between other parties, whose motions were *about* WVSSAC. In motions practice with the State and Intervenor, Plaintiff admitted a fact that supports WVSSAC’s arguments raised *ab initio*.

“The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party’s

² ECF No. 470 at 2 (emphasis added).

³ *The Courtland Co., Inc. v. Union Carbide*, 2022 U.S. Dist. Lexis 78174 (S.D. W. Va.), citing *EEOC v. Freeman*, 961 F. Supp. 2d 783, 801 (D. Md. 2013).

reply.” *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). WVSSAC satisfies this standard because this precise admission arose for the first time at the close of motions practice in a manner that logically would not suggest its application to WVSSAC directly absent this motions practice.

For the reasons set forth herein, WVSSAC respectfully requests that its Motion for Leave be granted and its Surreply filed as attached.

**WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION,
By Counsel.**

/S/ Roberta F. Green

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CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green, have this, the 19th day of September, 2022, served a true and exact copy of the foregoing **“WVSSAC’s Motion for Leave to File Surreply”** with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following counsel of record:

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